

DISTRICT OF COLUMBIA
DOH Office of Adjudication and Hearings
825 North Capitol Street N.E., Suite 5100
Washington D.C. 20002

DISTRICT OF COLUMBIA
DEPARTMENT OF HEALTH

Petitioner,

v.

LUSTIG ASSOCIATES BUILDING AND
DEVELOPING and PETER LUSTIG
Respondents

Case Nos.: I-00-11004
I-00-11054
I-00-11005
I-00-11055
(consolidated)

FINAL ORDER

I. Introduction

These consolidated matters arise under the Civil Infractions Act of 1985 (D.C. Code §§ 6-2701 *et seq.*) and Title 21 Chapter 5 of the District of Columbia Municipal Regulations (“DCMR”). By Notice of Infraction 00-11004 served January 11, 2001, the Government charged Respondents Lustig Associates Building and Developing and Peter Lustig with violating 21 DCMR 506.2 (failing to comply with an approved erosion and sedimentation plan)¹, and 21 DCMR 538.1(j) (failing to provide a sediment trap to protect inlet or storm sewer below

¹ 21 DCMR 506.2 provides: “If on final inspection or during any interim inspection, the Department of Public Works determines that the permittee has failed to comply with the plan, the Department of Consumer and Regulatory Affairs shall immediately serve upon the permittee, by registered or certified mail to the address specified by the permittee in his or her permit application, a notice to comply with the plan.”

silt producing areas)². These charges relate to a building permit to construct a residence secured by Respondents in 1998. The Notice of Infraction alleges that the infractions occurred on January 8, 2001 at 3602 Ordway Street, N.W., and seeks a fine of \$100.00 for each alleged infraction, for a total fine amount of \$200.00.

By Notice of Infraction 00-11005 served January 11, 2001, the Government also charged Respondents with violating 21 DCMR 502.1 (failing to obtain a permit)³, and 21 DCMR 538.1(j) (failing to provide a sediment trap to protect inlet or storm sewer below silt producing areas). These charges relate to a building permit to construct a retaining wall secured by Respondents in December, 2000. Notice of Infraction 00-11005 alleges that the infractions occurred on January 8, 2001 at 3602 Ordway Street, N.W. and seeks a fine of \$500.00 for the alleged violation of 21 DCMR 502.1 and \$100.00 for the alleged violation of 21 DCMR 538.1(j), for a total fine amount of \$600.00.

Respondents failed to answer either Notice of Infraction within the required twenty (20) days after service (fifteen (15) days plus five (5) additional days for service by mail pursuant to D.C. Code §§ 6-2712(e), 6-2715). Accordingly, this administrative court issued orders on February 7, 2001 finding Respondents in default, assessing statutory penalties totaling \$800.00

² 21 DCMR 538.1(j) provides: “The following are guidelines for erosion and sediment control planning in the District of Columbia . . . (j) Employ sediment traps to protect inlets or storm sewers below silt-producing areas

³ 21 DCMR 502.1 provides: “No person may engage in any land disturbing activity on any property within the District until that person has secured a building permit from the District. Approval of a

pursuant to D.C. Code § 6-2704(a)(2)(A) and requiring the Government to serve a second Notice of Infraction in each case pursuant to D.C. Code § 6-2712(f). The Government served the second Notices of Infraction (No. 00-11054 and No. 00-11055) on February 14, 2001.

On March 20, 2001, this administrative court received Respondents' untimely pleas of Deny to all the charges set forth in the four Notices of Infraction, along with a hearing request. On March 23, 2001, this administrative court issued an order which, among other things, consolidated the cases for all hearing purposes, set a hearing date of May 1, 2001 and, pursuant to D.C. Code § 6-2704(a)(2)(B), assessed Respondents an additional statutory penalty of \$800.00 (for a total of \$1,600.00) for their failure to timely respond to the second Notices of Infraction. The March 23rd Order also specified that copies of any document that the parties sought to offer into evidence at the hearing should be filed with the administrative court and served upon all other parties no later than ten (10) days prior to the date of the hearing.

The hearing took place on May 1, 2001 as scheduled. Appearing on behalf of the Government was Peter Nwangwu, the charging inspector in the cases. Respondent Peter Lustig appeared, *pro se*, on behalf of Respondents. At the start of the hearing, I granted Respondents leave to amend their pleas to the two (2) charges of violating 21 DCMR 538.1(j) from Deny to Admit with Explanation. The Government offered three previously submitted exhibits which

building permit shall be conditioned upon submission by the permit applicant of an erosion and sedimentation plan which has been reviewed and approved by the Department.

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were marked as Petitioner's Exhibit 100, 101 and 102 ("PX-100, PX-101, PX-102") and admitted into evidence. Respondents offered no documents into evidence.

II. Findings of Fact

Based upon the testimony of the Government's and Respondents' witnesses which I directly observed, the evidence admitted at the hearing and the entire record in this matter, I now make the following findings of fact:

1. The District of Columbia's Department of Consumer and Regulatory Affairs ("DCRA") issued Respondents a building permit to construct a home at the 3602 Ordway Street N.W. site ("construction site") in 1998. Respondents submitted an erosion and sedimentation control plan with their building permit application.
2. In December 2000, DCRA issued Respondents a building permit to construct a retaining wall at the construction site.⁴ With their permit application, Respondents submitted a site plan, which showed the boundaries of the site, the location of the house at the site, and the location of the proposed retaining wall. Respondents did not, however, submit an erosion and sedimentation control plan with their application. Upon the issuance of the building permit, DCRA advised Respondents that it had misplaced the site plan submitted with Respondents' application. Nevertheless, the building permit was issued for the project.

⁴ In December, 2000 Respondents received four permits in total relating to the construction of the retaining wall: a permit to build a retaining wall (public space); a permit to build a retaining wall (private space); a permit to close sidewalk during construction; and a permit to replace a driveway in public space. The Government did not specify which of the two retaining wall permits is at issue in this case.

3. The Government could not locate a copy of the erosion and sedimentation control plan associated with Respondents' 1998 building permit. In addition, no building permits, erosion and sedimentation control plans or other plans related to this case were submitted into evidence by the Government or Respondents.⁵
4. On January 8, 2001, the charging inspector visited the site based on a complaint he had received from an unidentified neighbor about its condition. Upon his arrival, the inspector requested that Respondents provide him a site plan for the project. In response, Respondents provided the inspector a cross-sectional drawing of a portion of the retaining wall under construction. While visiting the construction site, the inspector observed, among other things, a muddied sidewalk in front of the construction site, an area of land disturbance which was the approximate width of the front of the construction site, as well as a pile of dirt and debris abutting a neighbor's property. The inspector did not observe any erosion or sedimentation control at the construction site. *See* PX-100; PX-101; PX-102.
5. By their plea of Admit with Explanation, Respondents have admitted to two violations of 21 DCMR 538.1(j) on January 8, 2001 at the construction site. According to the inspector, one of the violations relates to the 1998 building

⁵ At the hearing, the inspector attempted to introduce into evidence an application for a building permit submitted to DCRA by Respondents. The inspector did not indicate, however, whether this application related to the 1998 permit or one of the December 2000 permits. Because the inspector had not previously submitted this document as required by the March 23, 2001 scheduling order, Respondents objected to its admission. Finding no good cause to excuse the lateness of the submission, this administrative court sustained Respondents' objection and did not admit the permit application into evidence.

permit, while the other violation relates the December, 2000 building permit to construct a retaining wall.

6. On January 8, 2001, Respondents failed to employ sediment traps to protect inlets or storm sewers below silt-producing areas at the construction site. Respondents maintain, however, that they were not required to employ such measures at the site.
7. Because Respondents believed that the Notices of Infraction were issued by the charging inspector as a form of harassment and were frivolous, Respondents did not provide timely answers to the four Notices of Infraction issued herein. Respondents indicated that, had they known they would be subject to a statutory penalty for failing to timely answer the Notices of Infraction, they would have timely responded.
8. There is no evidence in the record of a history of non-compliance on the part of Respondents.

III. Conclusions of Law

1. By their plea of Admit with Explanation, Respondents have admitted two violations of 21 DCMR 538.1(j) on January 8, 2001 as set forth in the captioned Notices of Infraction. One violation relates to Respondents' 1998 building permit, while the other relates to Respondents' December, 2000 building permit. A fine of \$100.00 is authorized for each violation. 16 DCMR 3234.2(v).

2. Respondents have requested a reduction or suspension of the fines for these violations. In their explanation, Respondents contend that they were not required by their building permits or related documents to provide sediment traps to protect inlets or storm sewers below silt producing areas as set forth in 21 DCMR 538.1(j).
3. Recent amendments to the Civil Infractions Fine Schedule prescribe the fine for a violation of 21 DCMR 538.1(j). *See* 47 D.C. Reg. 6892 (August 25, 2000) (revising 16 DCMR 3234). These amendments suggest that the former erosion and sedimentation control “guidelines” contained in 21 DCMR 538.1(j) must now be considered “requirements” to be complied with separate from the requirement that an erosion and sedimentation control plan be submitted when there is “land disturbing activity.” *See* 21 DCMR 502.1. As such, whether or not an entity is required to submit an erosion and sedimentation plan under 21 DCMR 502.1, it still must comply with the requirements of 21 DCMR 538.1(j).
4. Respondents suggest that the erosion and sedimentation control plan filed with their application for the 1998 building permit did not require the employment of sediment traps as set forth in section 538.1(j). To the extent an erosion and sedimentation plan expressly, or by clear implication, excludes the protections outlined in section 538.1(j), an argument perhaps could be fashioned that the requirements of section 538.1(j) do not apply, despite the independent basis for their application. Such is not the case before me, however. In this case,

Respondents have admitted the violation and have not submitted the erosion and sedimentation plan at issue to support their contentions.

5. Accordingly, I do not find Respondents' explanation that they were in full compliance with the erosion and sedimentation control plan to be a factor supporting a reduction of the authorized fine for a violation of 21 DCMR 538.1(j). In light of there being no evidence in the record of a history of Respondents' non-compliance, however, I will reduce the authorized fine of \$100.00 to \$75.00. *See* D.C. Code § 6-2703(b)(6); 18 U.S.C. § 3553; U.S.S.G. § 3E1.1
6. In contrast to the 1998 building permit application, Respondents did not submit an erosion and sedimentation control plan with their December, 2000 building permit application. Respondents explain that, as a result, they were not required to comply with the requirements of 21 DCMR 538.1(j). Again, Respondents' explanation is unavailing. As discussed above, the requirements of section 538.1(j) exist independently of the requirement to have an erosion and sedimentation control plan as set forth in 21 DCMR 502.1.
7. Accordingly, Respondents' explanation does not support a reduction of the authorized fine for a violation of 21 DCMR 538.1(j). In light of there being no evidence in the record of a history of Respondents' non-compliance, however, I will reduce the authorized fine of \$100.00 to \$75.00. *See* D.C. Code § 6-2703(b)(6); 18 U.S.C. § 3553; U.S.S.G. § 3E1.1.
8. As to the charged violation of 21 DCMR 502.1, it is undisputed that Respondents had a building permit. The Government suggests, however, that because

Respondents' project exceeded the scope of the permit issued by DCRA, they needed to obtain an additional permit. As a result, according to the Government, Respondents' failure to obtain an additional permit in this case constitutes a violation of 21 DCMR 502.1. Respondents deny violating the requirements of 21 DCMR 502.1.

9. This administrative court recently construed the clear expansion of the scope of a building permit authorizing a "land disturbing activity" without obtaining an additional permit to be violative of 21 DCMR 502.1. *See DOH v. Washington General Contractors*, OAH No. I-00-10387 at 6 (Final Order, July 11, 2001); *see also* 21 DCMR 599.1 (defining "land disturbing activity" for purposes of the regulation). In order to establish that the scope of a permit has been exceeded, however, it must first be established what that permit allows. In this case, I am unable to assess whether Respondents have exceeded the scope of their existing building permit because the Government failed to introduce the building permit into evidence. *Cf. Washington General Contractors*, No. OAH I-00-10387 at 6 (concluding permit which by its terms authorized the razing of an apartment building did not authorize the construction of a parking lot or any other land disturbance).
10. Because I cannot refer to the permit in question, I am left with the text of 21 DCMR 502.1 to assess whether Respondents violated that provision. 21 DCMR 502.1 provides that "no person may engage in any land disturbing activity on any property within the District until that person has secured a building permit from

the District. . . .” In this case, it is undisputed that on January 8, 2001, Respondents engaged in land disturbing activity and had a building permit.⁶ In turn, based on this record, Respondents were in compliance with 21 DCMR 502.1.

11. Accordingly, the Government has failed to meet its burden of proving Respondents’ alleged violation of 21 DCMR 502.1, and this charge shall be dismissed.
12. As to the charged violation of 21 DCMR 506.2, the Government contends that the scope of Respondents’ project required an erosion and sedimentation control plan to be in place.⁷ Respondents deny violating the requirements of 21 DCMR 506.2.
13. By its terms, 21 DCMR 506.2 addresses a failure to comply with an approved erosion and sedimentation control plan, not a failure to have such a plan in the first instance place.⁸ Because the Government has not submitted an erosion and sedimentation control plan into evidence, I am unable to determine whether Respondents failed to comply with such a plan, and, as a result, am unable to determine whether Respondents violated 21 DCMR 506.2. *Accord DOH v. Pro*

⁶ Any question as to whether this building permit may have been improperly issued by DCRA under these circumstances is, of course, is outside the jurisdiction of this administrative court.

⁷ While Respondents represent that they had an erosion and sedimentation control plan relating to their 1998 building permit, they represented that there was no such plan relating to the December, 2000 permits.

⁸ Under District of Columbia law, the approval of a building permit “shall be conditioned upon submission by the permit applicant of an erosion and sedimentation control plan which has been reviewed and approved by the Department.” 21 DCMR 502.1. The regulation places the burden of the proper issuance of a building permit squarely on the Government, not the permit applicant.

Tech Builders, Inc., OAH No. I-00-10231 at 1-2 (Final Order, June 7, 2001) (concluding that, absent some equally effective method of proving its contents, a copy of the actual approved erosion and sedimentation plan is required whenever the Government alleges a violation of 21 DCMR 506.2).

14. Accordingly, the Government has failed to meet its burden of proving Respondents' alleged violation 21 DCMR 506.2, and this charge shall be dismissed.
15. As to the penalty, if a respondent has been duly served a Notice of Infraction and fails, without good cause, to timely answer that Notice of Infraction, the respondent is liable for a statutory penalty equal to the amount of the authorized fine, and a second Notice of Infraction is issued. D.C. Code §§ 6-2704(a)(2)(A), 6-2712(f). If a respondent likewise fails to answer the second Notice of Infraction, the statutory penalty doubles. D.C. Code § 6-2704(a)(2)(B). In this case, Respondents represent that while they received all four Notices of Infraction at issue, they did not answer them in a timely fashion because they believed them to be frivolous and a form of harassment by the inspector. Respondents' explanation for their failure to timely respond to the Notices of Infraction does not establish good cause. Accordingly, Respondents are liable for statutory penalties in the total amount of \$1,600.00.

IV. ORDER

Based on the entire record in this matter it is, therefore, this _____ day of _____, 2001:

ORDERED, that the charge of violating 21 DCMR 506.2 as set forth in Notice of Infraction 00-11004 is hereby **DISMISSED**; and it is further

ORDERED, that the charge of violating 21 DCMR 502.1 as set forth in Notice of Infraction 00-11005 is hereby **DISMISSED**; and it is further

ORDERED, that Respondents shall jointly pay a total of **SEVENTEEN HUNDRED AND FIFTY DOLLARS (\$1,750.00)** in fines and statutory penalties in accordance with the attached instructions within twenty (20) calendar days of the date of mailing of this Order (fifteen (15) calendar days plus five (5) days for service by mail pursuant to D.C. Code § 6-2715); and it is further

ORDERED, that, if Respondents fail to pay the above amount in full within twenty (20) calendar days of the date of mailing of this Order, by law, interest must accrue on the unpaid amount at the rate of 1 ½% per month or portion thereof, beginning with the date of this Order. D.C. Code § 6-2713(i)(1), as amended by the Abatement and Condemnation of Nuisance

Properties Omnibus Amendment Act of 2000, D.C. Law 13-281, effective April 27, 2001; and it is further

ORDERED, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondents' licenses or permits pursuant to D.C. Code § 6-2713(f), the placement of a lien on real or personal property owned by Respondents pursuant to D.C. Code § 6-2713(i), and the sealing of Respondents' business premises or work sites pursuant to D.C. Code § 6-2703(b)(6).

/s/ **9/19/01**

Mark D. Poindexter
Administrative Judge